In The

Supreme Court of The United States

October Term, 1942.

No. .....

ASSOCIATION OF AMERICAN RAILROADS
and
THE LONG ISLAND RAIL ROAD COMPANY,
Cross-Petitioners,

vs.

SPERRY PRODUCTS, INC.,
Cross-Respondent.

BRIEF IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court by Judge Conger was filed January 12, 1942. It appears at page 42 of the record and is reported in 44 Fed. Supp. 660.

The opinion of the Circuit Court of Appeals (Circuit Judges L. Hand, Chase, and Frank, Judge Hand writing, Judge Frank concurring) was filed December 14, 1942, and appears at page 59 of the record. It is reported in 132 F. (2d) 408.

II.
JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended February 13, 1925, c. 229 (43 Stat. 938 (28 USCA 347)). The judgment of the Circuit Court of Appeals was entered December 31, 1942. The cross-petition was filed March ...., 1943.

III.
STATEMENT OF THE CASE.

The essential facts of the case are stated in the accompanying cross-petition for certiorari under the heading "Summary and Short Statement of Matter Involved," p. 2.

IV.
SPECIFICATION OF ERRORS.

The errors which the Cross-Petitioner will urge, if the cross-writ of certiorari is granted, are that the Circuit Court of Appeals erred—

1. In attributing "inhabitancy" to the Association of American Railroads as though it were a single jural person and not an aggregate under the jurisdictional limitations of Sec. 48 of the Judicial Code (R. 61 and 62).

2. In holding that the Association of American Railroads is an inhabitant within the meaning of Sec. 48 in the district in which its principal place of business is located (R. 63 and 64).

3. In holding that, if Sperry wishes to proceed against the admittedly innocent defendant, The Long Island Rail Road Company, for the alleged infringement committed by the Association and The New York Central, the Railroad must answer (R. 64) in spite of the failure of the complaint to state a cause of action against The Long Island indi-

vidually and the explanation in the Sperry letter (R. 35) that no bona fide action against the Railroad individually was intended.

V.

SUMMARY OF THE ARGUMENT.

Point A.

Attributing "inhabitancy" to the Association for the purpose of jurisdiction under Sec. 48 of the Judicial Code is contrary both to the purpose of that Act and to the long settled doctrine about status of groups for federal jurisdiction.

Point B.

Permitting the suit to proceed against the admittedly innocent Long Island Rail Road is contrary to the stated purpose of the complaint.

VI.

ARGUMENT.

Point A.

An unincorporated group is not an inhabitant and its status for federal jurisdiction must be judged by the inhabitance of its members.[1]

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[1] *Thomas* v. *Ohio State University Trustees,* 195 U. S. 207, 25 S. Ct. 24, 49 L. Ed. 160.
Great Southern Fire Proof Hotel Co. v. *Jones,* 177 U. S. 449, 20 S. Ct. 690, 44 L. Ed. 842.
Chapman v. *Barney,* 129 U. S. 677, 9 S. Ct. 426, 32 L. Ed. 800.
Lafayette v. *French et al.,* 18 How. 404 at 405, 15 L. Ed. 451 at 452.

In the *Stonite* decision,[2] this Court held that Sec. 48 of the Judicial Code is the exclusive provision controlling the venue in patent infringement proceedings, and that it was enacted to restrict a prior broader venue. (315 U. S. 561 at 563, 566, and 567, 86 L. Ed. 1026 at 1028 and 1030.) Admittedly, that section denies venue over all the members of the Association who are not inhabitants of the Southern District of New York—all the members except The Long Island (R. 52), which is declared to be innocent of the infringement complained of (R. 35 and 36). The complaint was dismissed as to five defendant member roads for want of venue and the Cross-Respondent acquiesced (R. 59).

But by the indirect method of attributing "inhabitancy" to the Association as though it were a single jural person and not an aggregate (R. 61 and 62) that it really is, the decision of the Circuit Court of Appeals would give venue over the aggregate of member railroads scattered throughout two-thirds of the states of the United States and Canada, and thus would work a vast expansion of venue contrary to the purpose of Sec. 48 to restrict the venue and define its exact limits, as this Court so recently found in the *Stonite* decision. It would indirectly give venue over even those member railroads as to which it has been denied with Cross-Respondent's acquiescence.

The privilege of more than two hundred member roads not to be sued in the Southern District of New York for infringement alleged to have been committed by the A. A. R. and The New York Central Railroad in some other district was within the intent of the Statute as found by this Court. An interpretation that would take away that privilege indirectly should hardly be put into effect without the sanction of this Court.

[2] *Stonite Products Co.* v. *Lloyd Co.*, 315 U. S. 561, 86 L. Ed. 1026.

Jurisdiction and Venue Not Extended by the Coronado Case and the Rules of Civil Procedure.

Some indeed thought that the *Coronado* decision (1922)[1] extended the corporate fiction to unincorporated associations. But the Circuit Court of Appeals for the Second Circuit took the fore in denying that. In the *Levering* decision (1932),[2] that Court, on the authority of decisions of this court[3] prior to the *Coronado* decision (61 F. (2d) 117, column 2 *et seq.*), refused to attach the presumption of citizenship in a state in which an unincorporated association had its headquarters.

Puerto Rico v. Russell.

Seven months later, in the *Puerto Rico* case (1933)[4] in a decision by Mr. Chief Justice Stone (then Associate Justice), this Court cited the *Levering* decision with apparent approval along with the earlier decisions of this Court there relied upon.

In 1938, the *Puerto Rico* decision was cited along with the *Coronado* decision in the notes under Rule 17 (b) R. C. P. on Capacity to Sue or Be Sued, and Rule 82 expressly provides that the Rules of Civil Procedure shall not be construed to extend or limit the jurisdiction of the District Courts of the United States or the venue of actions therein.

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[1] *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, 42 S. Ct. 570, 66 L. Ed. 975.

[2] *Levering et al.* v. *Morrin*, 61 F. (2d) 115.

[3] *Chapman* v. *Barney*, 129 U. S. 677, 9 S. Ct. 426, 32 L. Ed. 800.
Great Southern Fire Proof Hotel Co. v. *Jones*, 177 U. S. 449, 20 S. Ct. 690, 44 L. Ed. 842.
Thomas v. *Ohio State University Trustees*, 195 U. S. 207, 25 S. Ct. 24, 49 L. Ed. 160.

[4] *Puerto Rico* v. *Russell*, 288 U. S. 476 at 480, 53 S. Ct. 447, 77 L. Ed. 903 at 907.

The *Puerto Rico* decision, referring to the earlier decisions by this Court cited along with the *Levering* decision, found that the status as a unit for purposes of suit alone,

as in the case of a joint stock company, or a limited partnership, or a board of trustees created by state law, had been deemed a legal personality too incomplete for the purpose of federal jurisdiction,

> "* * * what was but an association of individuals for so many ends and a juridical entity for only a few, was not easily to be treated as if it were a single citizen." (77 L. Ed. 907, 288 U. S. 480.)

From this it would seem to follow, as night the day, that the Association of American Railroads is not easily or properly attributed an inhabitancy within the meaning and intent of Section 48 of the Judicial Code, as though it were a single jural person and not an aggregate that it surely is.

To us, the decision of the Circuit Court of Appeals attributing "inhabitancy" to the Association of American Railroads under Sec. 48 in the district in which its principal place of business is located conflicts with this apparently settled doctrine of this court. The District Court relied on the *Levering* and *Puerto Rico* decisions and correctly applied that doctrine.

Sutherland v. the United States.

In the *Sutherland* case,[1] suit was brought in the district of Nebraska against a partnership composed of husband and wife living in Kansas City, Missouri, and neither being a resident, citizen, or inhabitant of the district of Nebraska, although the partnership had a place of business in Omaha, Nebraska. (74 F. (2d) 90, column 1.)

In determining that the suit could not be maintained against the partnership in Nebraska, the Circuit Court of Appeals for the Eighth Circuit (Circuit Judges Gardner, Sanborn, and Woodrough, Judge Sanborn writing) assumed that the partnership was, under the laws of Nebraska, a separate legal entity with a domicile in the district, that it was properly served with subpoena, and that the National Industrial Recovery Act (48 Stat. 195) re-

[1] Sutherland v. The United States, 74 F. (2d) 89

quires that it be treated as a person for the purposes of federal jurisdiction. (74 Fed. (2d) 90, column 2.) And, relying on the *Puerto Rico* and *Levering* decisions, together with the decisions of this court prior to the *Coronado* case, it held that a partnership is to be regarded as an inhabitant of the state of which the partners are citizens, and no other. (74 Fed. (2d) 93.)

Diversity Cases Are Guiding Precedents.[1]

The Government there contended that the authorities which hold that the citizenship of a firm is to be determined by the citizenship of the partners, are not applicable to a case where the jurisdiction is based on grounds other than diversity, and argued that, although the partnership is a citizen of Missouri, it can still be an inhabitant of Nebraska and in fact an inhabitant of every state in which it has a place of business and by the laws of which it is recognized as a distinct legal entity. The Circuit Court of Appeals, however, noted that the same suggestion had been advanced with respect to corporations and rejected, and quoted as authority the earlier decision of this court *in Re Keasbey & Mattison* (160 U. S. 221 at 229, 16 S. Ct. 273 at 275, 40 L. Ed. 402 at 405), where it held that the reasoning of the diversity cases is equally applicable to the other class of cases, and the only difference is that by the very terms of the Statute, as is the case with Sec. 48 of the Judicial Code, the suit is to be brought in the district in which the defendant is an inhabitant and cannot, without the consent of the defendant, be brought elsewhere.

To us, the decision of the Circuit Court of Appeals of the Second Circuit in the instant case conflicts with the doctrine of the Circuit Court of Appeals for the Eighth Circuit as it understood the decisions of this court, including that in the *Puerto Rico* case.

[1] The Circuit Court of Appeals seems inclined (R. 61) to distinguish diversity cases.

Point B.

The Long Island Rail Road Company was one of five admittedly innocent member roads who were named defendants as "representatives" (R. 5, paragraph 7) in the scheme to sue the Association by representation in the Southern District of New York and in a class action. But Sperry hastened to explain to those five roads by letters (R. 35) that the infringement complained of was committed by the Association and The New York Central Rail Road, that none of them was alleged to have infringed individually, or was to be put to any trouble or expense, and, as none had used the alleged infringing car, none would be liable for damages for such use.

That man-to-man explanation of the suit by a layman to laymen shows that no bona fide action against those member roads was intended, and no cause of action was stated or intended to be stated for relief against any one of them individually. Sperry wanted that clearly understood by those innocent member roads in spite of anything they might otherwise fear from the complaint.

They were not sued on any imputed liability for the use of the magnetic car X-201. Each of them was told: "This suit will place your Railroad at no trouble or expense because it is our understanding that the A. A. R. will defend this suit. Since your Railroad never used the A. A. R. magnetic car X-201 it will not be liable for damages for such use * * *" (R. 36). They were named defendants solely because they were incorporated in New York and members of the Association, as related in the letters (R. 36): "* * * therefore suit was brought against the Association and these six Railroads in the U. S. District Court for the Southern District of New York. You will therefore understand that the only way by which one can sue the A. A. R. is by filing suit against its individual members. * * *

"You will recognize the purely legal technicality which made this step necessary by our attorneys, and I trust that

this action will in no way affect the cordial relations which have existed between us." (R. 36.)

As the others proved not to be inhabitants of the Southern District of New York, the complaint was dismissed as to them, and after this Court's decision in the *Stonite* case the Cross-Respondent acquiesced. The District Court correctly dismissed the complaint as to The Long Island for failure to state a claim upon which relief can be granted (R. 52). But the Circuit Court of Appeals reversed that judgment and held that "If the plaintiff wishes to proceed against the railroad, the railroad must answer; * * *" (R. 64).

The infringement complained of, as explained by the Sperry letters (R. 36),

> "* * * was committed by the A. A. R. and The New York Central Railroad."

To put The Long Island to answer for that infringement, after the letter explaining the suit (R. 35, 36) is contrary to the stated purpose of the complaint, as it was specifically explained to the Cross-Respondent.

The Long Island Rail Road Company was named a defendant solely as a representative in the Cross-Respondent's scheme to sue the Association in the Southern District of New York by filing suit against the members that were New York corporations. Since it cannot serve that sole purpose, the complaint was properly dismissed by the District Court for failure to state a claim against that Railroad on which relief can be granted.